PUBLIC MATTER -- DESIGNATED FOR PUBLICATION

Filed November 22, 2002

REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of **Mitchell H. Kreitenberg**, A Member of the State Bar.	**99-C-11604** **OPINION ON REVIEW**

This felony conviction referral matter involves serious misconduct by respondent, Mitchell H. Kreitenberg, which occurred over a six-year period. The State Bar Court hearing judge found respondent's involvement in a capping scheme, fee splitting arrangement and conspiracy to defraud the Internal Revenue Service in violation of title 18 United States Code section 371, constituted acts of moral turpitude. Respondent does not challenge this finding, and, therefore, culpability is not at issue. However, the State Bar is appealing the recommendation of the hearing judge that respondent be actually suspended for four years and, instead, is seeking disbarment; respondent maintains that two to three years of actual suspension is the appropriate discipline. In order to decide this issue, we must determine whether the evidence presented in mitigation is compelling enough to outweigh conduct that otherwise would result in a disbarment recommendation.

Given the magnitude, scope and duration of respondent's crime, we conclude that he should be disbarred. We cannot agree with the hearing judge that the mitigation evidence is so compelling as to warrant a discipline less than disbarment. Despite the progress towards

rehabilitation that respondent has made to date, our paramount duty to protect the public, courts and profession dictates that reinstatement proceedings are the appropriate means by which respondent should demonstrate his fitness to practice law. The lesser showing that would be required of respondent in proceedings under Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct, standard 1.4(c)(ii) is insufficient to maintain the integrity of the profession, in light of the seriousness of his misconduct.[1]

I. Procedural and Factual Background

Respondent was admitted to practice in June 1983, and has no prior record of discipline. He began his legal career in 1984, at an in-house law firm for an insurance company, where his annual salary was about $34,000. Three years later, in 1987, respondent was recruited by his cousin and mentor, Manny Kreitenberg, to join him in a personal injury practice. The law firm was denominated "The Law Offices of Mitchell Kreitenberg," and respondent was responsible for managing the office, although his cousin was involved in most aspects of the practice. (Manny Kreitenberg also operated a separate law office that respondent was no part of.)

Shortly after respondent began practicing personal injury law with his cousin, he became aware that some, if not all, of his cases were referred by cappers, who were paid for their referrals. Respondent also was aware that the legal fees from the cases referred by the cappers were split among his cousin, his non-attorney office manager, Elvira Topor, and himself. Respondent knew that these activities were illegal, and on several occasions he expressed his concern to Manny Kreitenberg, but his cousin told him "this is the way it works and if you don't

[1]All further references to standards are to these Standards for Attorney Sanctions for Professional Misconduct, and all further references to rules are to these Rules of Procedure of the State Bar, unless otherwise indicated.

like it you can leave. . . ." Respondent now wishes he had had the strength to leave; but he remained in the practice with his cousin. Indeed, in 1991, the seriousness of respondent's misconduct escalated beyond mere capping and fee splitting when he, his cousin and his office manager devised a plan to use respondent's client trust account for the purposes of paying for the illegal referrals and for shielding his income from the Internal Revenue Service (IRS).

In accordance with the illegal plan, respondent deposited settlement awards into his client trust account, and the appropriate disbursements were made to the client, medical doctors and others. However, the portion of the settlement award allocated to legal fees was not disbursed as such to respondent. Instead, respondent wrote a second, fraudulent check, drawn against the trust account, using the name of his client as a fictitious payee and in an amount similar to the previous amount paid to the client. To further disguise the withdrawals of his fees from the IRS and the State Bar, respondent and his cousin agreed that the checks should be in a non-sequential order from the initial checks to the clients. Early in the scheme, the duplicate, phony checks were signed by the clients, who were inveigled to do so under false pretenses by the office manager. When this became cumbersome, due to the resistance of some clients, the plan was modified so that the office manager forged the signatures of the clients who were named on the checks.

In this manner, over 680 phony checks were written by respondent during a three-year period, and about $1,640,000 in legal fees was withdrawn from the trust account. None of this money was reported as income to the IRS. Instead, respondent's office manager used the money to pay cappers, who, in turn, referred still more lawsuits, generating additional legal fees, which were split equally among respondent, his cousin and the office manager. As a result of this

conspiracy, respondent was able to earn an income of approximately $250,000 to $300,000 a year during the years 1990, 1991 and 1992. There is no evidence that the check-writing scheme would have stopped, but for the intervention of the IRS, which commenced an audit of respondent's tax returns in April 1993. At that point, respondent ceased writing the fraudulent checks and paying cappers.

Initially, respondent and his civil attorney cooperated on a limited basis with the IRS, providing various documents and records, as requested. Three years later, in September 1996, respondent learned that he was the subject of a criminal investigation by the United States Department of Justice arising out of the check-writing scheme. After he retained a criminal defense attorney, respondent met with the Assistant United States Attorney, whereupon he fully confessed to his criminal activities. On April 24, 1997, an information was filed in United States District Court for the Central District of California (District Court), charging respondent with one count of conspiracy to defraud the IRS under title 18 United States Code section 371, and in May 1997, pursuant to a plea agreement, respondent pled guilty to this count. As part of the plea agreement, respondent was required to meet with an IRS agent to determine the amount of taxes owed and to pay all back taxes, interest and penalties. There is no evidence in the record that respondent has fully repaid his back taxes.

Sentencing was delayed for the next one and one-half years to encourage respondent to provide detailed information and assistance to the government in aid of the investigation of the check-writing and capping conspiracy. As a consequence of his cooperation, the government successfully prosecuted respondent's cousin for his participation in the conspiracy.[2] Respondent

[2]Manny Kreitenberg resigned as a member of the State Bar with charges pending in 1994.

also provided information and files to the government on numerous occasions concerning other targets of the government's investigation. In January 1999, he was given credit for his cooperation and sentenced by the District Court to five years' probation, including three months in a correctional center and three months' home detention.

We placed respondent on interim suspension in 1999, and the matter was referred to the hearing department. Respondent stipulated to the facts underlying the conspiracy, but he did not stipulate to a finding of moral turpitude. Based on the evidence presented by the State Bar, the hearing judge found respondent culpable of moral turpitude, citing *In re Hallinan* (1954) 43 Cal.2d 243, 247. The majority of the hearing focused on respondent's evidence in mitigation, which included three witnesses who testified to his good character, and approximately twenty-five letters from relatives, friends, classmates and professional colleagues attesting to respondent's strong relationship with his extended family, his participation in his religious community and his contributions to his community in general. The letters had been submitted previously to the District Court in preparation for respondent's sentencing hearing and, therefore, were not directed to the State Bar Court. Nevertheless, as part of the stipulated record, the letters were entered into evidence by respondent "for all purposes" without objection from the State Bar. The stipulated record also included a few other good character letters that previously were lodged with the Workers' Compensation Appeals Board on behalf of respondent, but, with one exception, were duplicative, since they were written by the same authors as those who had submitted letters to the District Court.

Based on this evidence of good character, which the hearing judge found was "extraordinary," he recommended that respondent be suspended from the practice of law for six

years, stayed, and that he be actually suspended for four years and until he complied with standard 1.4(c)(ii). His decision, filed on July 19, 2001, was modified on August 23, 2001, to clarify that respondent should be given credit for his interim suspension, which began on October, 27, 1999. Accordingly, if respondent timely complies with standard 1.4(c)(ii), he could be eligible to practice law in October of 2003, prior to the completion of his federal sentence, which should end in 2004, provided all of the terms of respondent's probation in the criminal case are satisfied.

On appeal, the State Bar contends that disbarment is warranted under the facts and circumstances presented by this record.[3] Respondent does not challenge the hearing judge's finding of moral turpitude, but asserts that two to three years' actual suspension is the appropriate discipline.

II. Discussion

A. Acts of Moral Turpitude

Respondent stipulated to the facts and circumstances surrounding his crime, although not to a finding of moral turpitude. He pled guilty to only one felony count of conspiring to defraud the government (18 U.S.C. § 371); nevertheless, the underlying acts of misconduct were far ranging and of extended duration. Respondent, his cousin and his office manager devised a

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[3]Although the State Bar did not file a Motion for Summary Disbarment below, it raises the issue on appeal that this is an appropriate case for summary disbarment. A violation of title 18 United States Code section 371 requires a determination by the hearing department of whether the crime involves moral turpitude under the facts and circumstances of the case. The crime is not *per se* moral turpitude, and therefore is ineligible for summary disbarment under Business and Professions Code section 6102, subdivision (c). (*In re Chernik* (1989) 49 Cal.3d 467, 469-470; *In re Severo* (1986) 41 Cal.3d 493, 496; *In re Chira* (1986) 42 Cal.3d 904, 906-907.) We may not reject this precedent.

purposeful plan to use respondent's trust account as a subterfuge to avoid paying income taxes due on respondent's legal fees. As part of the conspiracy, which lasted three years, respondent personally drafted hundreds of phony checks by misappropriating his clients' names as fictitious payees and authorizing the checks to be forged in their names. In this manner, nearly 1.6 million dollars in legal fees were illegally diverted from the trust account. The fees that were withdrawn from the trust account were used by respondent specifically to fund a massive capping and fee splitting scheme, for the principal purpose of further enriching himself, his cousin and his non-attorney office manager.[4] In exercising our independent review of the record (Cal. Rules of Court, rule 951.5; rule 305(a); *In re Morse* (1995) 11 Cal.4th 184, 207), we find that the facts and circumstances surrounding respondent's scheme to defraud the government (18 U.S.C. § 371) present clear and convincing evidence of moral turpitude, and, accordingly, we adopt the hearing judge's finding of culpability. Respondent's misconduct in misappropriating his clients' identities and authorizing the forgery of their signatures, as well as conspiring to use his trust account for illegal purposes was dishonest. However else moral turpitude may be defined, it most certainly includes these deceitful acts by respondent for his personal gain. (See *In re Schwartz* (1982) 31 Cal.3d 395,400; *In re Chira*, *supra*, 42 Cal.3d 904, 909.)

B. Aggravating Circumstances

We agree with the hearing judge's finding as aggravation that there was a pattern of misconduct. (Std. 1.2(b)(ii).) Indeed, the pattern involved multiple acts of wrongdoing. But, our calculation of the duration of the misconduct is significantly longer than that of the hearing judge, who found the relevant time period to be three years from the inception of the conspiracy

[4]There is no evidence that any of the law suits referred by the cappers were fraudulent.

until its abrupt termination with the delivery of the audit letter by the IRS. We find the appropriate time period to be six years, which is the length of time that respondent knew about and agreed to the use of cappers and fee splitting with a non-attorney, and includes the three-year period of the check-writing conspiracy.

We also agree with the hearing judge's finding that respondent personally gained from his misconduct and that this is an aggravating factor. The record confirms that respondent, his cousin and his office manager *each* received between $250,000 and $300,000 per year in fees as a result of the conspiracy. Indeed, respondent testified that his primary motivation in participating in the scheme was "the chance to make more money."

The hearing judge further found that there was harm to the public because of respondent's failure to pay income taxes, and we agree. (Std. 1.2(b)(iv).) However, we cannot agree with the hearing judge's finding that there was no harm to respondent's clients. To be sure, there is no evidence that respondent failed to timely disburse the settlement amounts due to his clients. Nonetheless, the harm occurred each time respondent breached his client's trust by misappropriating the client's identity for respondent's own personal gain. He further abdicated his fiduciary responsibilities to his clients by allowing them to be misled into signing the phony checks or permitting their signatures to be forged. Such actions were a clear betrayal of his clients' best interests in favor of his own selfish desires. It has long been a fundamental premise of the practice of law that "the relationship between an attorney and client is of the highest order of fiduciary relation.[citation.]" (*In the Matter of Feldsott* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 754, 757.) Moreover, respondent's actions exposed his clients to possible tax audits and their unwitting involvement in his conspiracy to defraud the IRS. (See, e.g., *In re Distefano*

(1975) 13 Cal.3d 476, 481-482.) "It is precisely because the attorney-client relationship is one of utmost confidence that the commission of a felony in betrayal of that confidence receives the harshest sanction the disciplinary system imposes." (*In the Matter of Lilly* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 473, 479.)

We find additional factors in aggravation that were not identified by the hearing judge. Respondent pled guilty to intentionally hiding his fees so as to escape detection by the IRS. However, the check writing scheme also was intended to conceal respondent's misuse of his client trust account from the State Bar, which we find to be an aggravating factor. (Std. 1.2(b)(iii).) In addition, we find that respondent's check writing scheme was directly related to his obligations as an attorney; indeed, the conspiracy lay at the very heart of his practice. Standard 2.3 provides guidance in this instance: "Culpability of a member of an act of moral turpitude, fraud, or intentional dishonesty toward . . . a client or another person or of concealment of a material fact to . . . a client or another person shall result in actual suspension or disbarment . . . depending upon the magnitude of the act of misconduct and the *degree to which it relates to the member's acts within the practice of law*." (Italics added.) Respondent's misconduct touched on virtually every aspect of his law practice: he repeatedly misused his client trust account for his own purposes; he purchased lawsuits from cappers to generate legal fees; and, he split those fees with his cousin and his non-attorney office manager. Most importantly, but for his relationship with his clients as their attorney, respondent would not have had the opportunity to appropriate their names, nor would he have been privy to the information about their settlement awards, which he utilized in drafting each fraudulent check. There is a clear

nexus between the felony committed here and respondent's responsibilities as an attorney. Accordingly, we find this to be an aggravating factor.

C. Mitigating Circumstances

The hearing judge found that respondent made an "extraordinary demonstration" of good character, based on three character witnesses and approximately twenty-five good character letters. We give great deference to the hearing judge's findings of credibility of respondent's character witnesses (rule 305(a); *In the Matter of Respondent A* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 255, 262), and we concur that their testimony placed respondent in a very favorable light.

The first witness, Steven Fabiano, has known respondent for almost twenty years and employed him as a part-time paralegal. They met when they worked for the in-house firm for the insurance company. They saw each other sporadically, but when Mr. Fabiano read in the newspaper about respondent's conviction, he contacted him. They discussed respondent's misconduct on "numerous" occasions, and during those discussions respondent never once denied his complicity or tried to shift the blame. Mr. Fabiano was of the opinion that respondent was remorseful and would not commit any further misconduct, largely because of his close relationship to his family, which respondent would not want to jeopardize.

The second character witness, who the hearing judge found to be "very credible," was Thomas Phillips, a law school classmate and co-worker with respondent at the in-house law firm for the insurance company. Mr. Phillips was aware of many of the particulars of respondent's crime and the surrounding circumstances and believed that Manny Kreitenberg led respondent into the conspiracy as the result of their close, mentoring relationship. He also testified that

respondent did not blame his cousin and took full responsibility for his misdeeds. Mr. Phillips testified he remained a good friend of respondent and would be willing to hire him as a partner in his firm if he were allowed to practice law. Mr. Phillips firmly believed that respondent had been rehabilitated and should be given a second chance.

The third witness, Ronald Nessim, was a former Assistant United States Attorney and is in private criminal defense practice. According to the hearing judge, he was "a very impressive character witness." Mr. Nessim was fully aware of all of the particulars of respondent's involvement in the conspiracy, because he represented the cousin, Manny Kreitenberg, in the District Court proceedings. His personal relationship with respondent extended back to childhood, when they lived in the same neighborhood, and they continued their friendship on a social basis. Mr. Nessim felt that his client, Manny Kreitenberg, was the true leader of the check-writing operation and that respondent was less culpable of the crime. He believed that his client was able to influence respondent to participate in the conspiracy due to their close family relationship. He further testified that he had "no doubts" that respondent would never commit another crime of any kind and believed respondent fully accepted responsibility for his participation in the conspiracy.

Although each of these three witnesses testified persuasively as to respondent's good character and his rehabilitation, such testimony was not offered from a sufficiently "wide range" of references. (Std.1.2 (e)(vi); *In the Matter of Kueker* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 583, 594-595.) Moreover, strong character evidence alone, no matter how positive, is not determinative of rehabilitation. (*Hippard v. State Bar* (1989) 49 Cal.3d 1084, 1095.) The numerous character letters from family, friends and colleagues submitted by respondent do little

to fill the evidentiary gap needed in mitigation of respondent's serious misconduct. To be sure, all of the letter writers attested to respondent's attributes as a good family man and a religious person, as well as his extensive community involvement. The hearing judge found that each of the writers was "fully aware of the serious misconduct committed by respondent." We respectfully disagree. The vast majority of the letters stated the writers were aware that respondent either had serious problems with the law, or had made a terrible mistake. A few writers were aware of the specific charge or of the nature of his conviction. But, a close reading of these letters shows that, apart from the testimonials written by the three individuals who testified in the proceedings in the State Bar Court, one can reasonably infer from only three of the other letters that the authors were fully aware of the specific facts and circumstances surrounding respondent's conviction for conspiracy to defraud the government. As such, we find that, with few exceptions, the letters do not demonstrate that the writers were aware of the full extent of respondent's misconduct. (Std. 1.2(e)(vi); *In re Ford* (1988) 44 Cal.3d 810**,** 818; see also *Seide v. Committee of Bar Examiners* (1989) 49 Cal.3d 933, 939.)

Equally problematic is the relevance of the character letters, since they were directed to the sentencing judge in the District Court in support of leniency. The purpose of criminal proceedings differs from that of disciplinary hearings. The Supreme Court discussed this difference in *In re Distefano*, *supra*, 13 Cal. 3d at page 481: "The trial court was dealing with him as a citizen, whereas we are dealing with him as a lawyer. . . . The responsibilities of a lawyer differ from those of a layman; 'Correspondingly, our duty to the public and to the lawyers of the state in this respect differs from that of the trial judge in administering criminal law.' [Citation.]" Indeed, the letters movingly described respondent's sincere and deep remorse, but

they did not address the disciplinary concerns of the State Bar or discuss respondent's fitness for practice. "Remorse does not demonstrate rehabilitation." (*In re Conflenti* (1981) 29 Cal. 3d 120, 124.) A close reading of these letters compels the conclusion that they are entitled to only limited weight as mitigation evidence.

We do find the character letter from respondent's psychologist, Dr. Neil Einbund, which was also directed to the District Court, to be relevant. He wrote eloquently of respondent's voluntary psychotherapy to gain insight into the conduct that led him into criminal activity. He further opined that respondent had shown a rare strength of character and that he would not pose a danger to the public, the courts or his clients. We therefore give significant mitigation credit to the letter submitted by Dr. Einbund, as well as to respondent's voluntary therapy, which demonstrates a substantial effort by respondent to rectify his misconduct. (Std. 1.2(e)(vii); *In the Matter of Kueker*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 591.)

We also give weight to the testimony of respondent, who was forthright about his involvement in the conspiracy and his financial motivation. He fully and without reservation accepted responsibility, and his remorse appeared to be genuine. His strong ties to his family and the community also were evident from his testimony and would no doubt act as strong motivation and assurance of no further misconduct. Respondent's testimony demonstrated that he has fully acknowledged his wrongdoing and has taken steps to prevent its recurrence, which we find is a factor in mitigation. (Std. 1.2(e)(vii).)

In exercising our independent review of the record, we conclude that respondent's other mitigation evidence, discussed below, is not as persuasive or as compelling as the hearing judge found. For example, respondent points to the absence of prior misconduct as mitigation.

(Std. 1.2(e)(i)). The hearing judge assigned "little weight" in mitigation, having found that respondent's misconduct started in 1990 -- seven years after he was admitted to the bar. But, respondent testified that he participated in fee splitting and the use of cappers shortly after he joined his cousin to practice personal injury law in 1987. Thus, respondent practiced law for only three or four years before he knowingly engaged in misconduct. Such a short period of unblemished practice is insignificant for purposes of mitigation. (*Kelly v. State Bar* (1988) 45 Cal.3d 649, 658 [seven and one-half years without prior discipline insufficient for mitigation]; *In the Matter of Rech* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 310, 316 [eight years without discipline does not merit significant mitigation]; *In the Matter of DeMassa* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 737, 752 (eight years not significant mitigation].) Accordingly, we give no weight to this mitigating factor.

The hearing judge found as mitigation that respondent "displayed full candor and cooperation with the Internal Revenue Service and the United States Department of Justice, as well as the State Bar." (Std. 1.2(e)(v).) The hearing judge also found in mitigation that respondent promptly took objective steps that demonstrated his recognition of his wrongdoing. (Std. 1.2(e)(vii).) Again, we respectfully disagree with these findings. As troubled as respondent claimed to be about his ongoing transgressions, he did nothing to stop the conspiracy during its three years, nor did he opt out. Indeed, the record shows that respondent's recognition of his wrongdoing occurred only *after* the IRS audit was commenced, and even then his remorse was not complete. It is true that at that point respondent stopped the fraudulent check scheme and the payments to cappers, recognizing that with the intervention of the IRS, "there were bad things

out there that were going to probably come to light and did. That was actually my bell ringing . . . to stop doing what I was doing."

But, respondent did not acknowledge the full extent of his participation in the conspiracy until he confessed to his crime in October 1996 -- over three years after he received the IRS audit letter, and then only after learning he was the subject of a criminal investigation.[5] Once he met with the Assistant United States Attorney, respondent acknowledged his role and accepted responsibility for his conduct. Respondent's cooperation with the United States Attorney continued over one and one-half years in order to gain a lighter sentence for himself. Also, Respondent did cooperate with the State Bar, entering into a Partial Stipulation of Undisputed Facts. Therefore, we give only slight weight in mitigation to respondent's delayed recognition of this wrongdoing and his subsequent cooperation with the United States government and the State Bar. (Cf. *Kaplan v. State Bar* (1991) 52 Cal.3d 1067, 1070, 1072-1073; cf. *In the Matter of Kueker*, *supra*, 1 Cal. State Bar Ct. Rptr. at pp. 591, 594.)

The hearing judge gave some consideration to the fact that respondent was a follower and not a leader in the conspiracy. It is true that respondent and his cousin grew up together in a tightly-knit, immigrant family and that respondent trusted his cousin and looked up to him. But, respondent clearly knew virtually from the outset that what he was doing was wrong, even hiding the details of his law practice from friends and colleagues and dissuading his brother from joining him in his law office. Respondent appeared to take some measure of comfort in not

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[5]In his good character letter to the District Court Judge in support of respondent, Ronald Nessim acknowledged that respondent did not fully admit his culpability early in the investigation, and instead, under the advice of his tax attorney, respondent mischaracterized the capping payments to the IRS as marketing fees that should have been considered as valid tax deductions.

knowing the identities of the cappers or in not paying them personally, but he otherwise participated as an equal in the conspiracy, deciding with his cousin and his office manager on various modifications to the scheme to assure its ongoing success, and drawing an equal amount of the fees. Finally, the clients whose names he misappropriated were the clients of The Law Offices of Mitchell Kreitenberg. We, therefore, give no mitigation weight to the fact that Manny Kreitenberg first involved respondent in the conspiracy.

D. Discipline

The record contains substantial evidence of respondent's rehabilitation and good character, but it is by no means overwhelming or determinative. Character evidence must be measured against the gravity of respondent's crimes. (Cf. *In re Menna* (1995) 11 Cal.4th 975, 988; See *In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 509-510, 514-515.) Moreover, in a conviction referral matter, the discipline must be imposed commensurate with the gravity of the crime and the circumstances surrounding the crime. We look to standard 3.2, which provides for disbarment of any attorney who has committed a crime of moral turpitude unless the most compelling mitigating circumstances clearly predominate. "'[D]isbarments, and not suspensions, have been the rule rather than the exception in cases of serious crimes involving moral turpitude . . . .' [Citation.]" (*In re Crooks* (1990) 51 Cal.3d 1090, 1101.) Respondent urges us to consider the cases of *In re Chira, supra,* 42 Cal.3d 904; *In re Chernik*, *supra*, 49 Cal.3d 467; and *In the Matter of Moriarty* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 245, as authority for suspension rather than disbarment. But, we find these cases to be distinguishable, since each involved "a few isolated incidents," whereas respondent's purposeful plan to defraud the government continued over several years and involved *hundreds*

of falsely subscribed checks. (Cf. *Kaplan v. State Bar*, *supra*, 52 Cal.3d at p. 1071 [disbarment for 24 separate acts of misappropriation over several months from a law partnership fund].)

The instant matter must also be distinguished from the typical capping case where a hapless young attorney does not fully understand the implications of how business is ethically generated or only learns about the misconduct of others in his law office after the fact. (See, e.g., *In the Matter of Jones* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 411; *In the Matter of Nelson* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 178.) Virtually from the outset, respondent was actively involved in the check-writing scheme, and he was fully aware of the impropriety of his actions, hiding them from the State Bar, the IRS, his colleagues and his family. Although respondent testified that his transgressions were due to his youth and inexperience, he also admitted it was the lure of making between $250,000 and $300,000 a year that was the primary motivator. He also said he felt trapped within the conspiracy and continued his conduct because his cousin, Manny Kreitenberg, was not only his co-conspirator, but his mentor as well. He believed he had no one else to turn to for counsel.

Similar claims were rejected as mitigation by the Supreme Court in *In re Severo, supra,* 41 Cal. 3d at page 501: "[P]etitioner's 'youth and inexperience' [do not] provide a basis here for concluding that his conduct should be viewed leniently and that he is presently able to practice law. He did not act negligently or by mistake, but participated knowingly in illegal acts. [citations.]" Respondent's misconduct was neither an inadvertent nor a short-lived venture into the realm of the unethical. Indeed, there is no indication in the record that, absent the action of the IRS, respondent would have discontinued the fraudulent plan. A similar concern was voiced

by the Supreme Court in *In re Basinger* (1998) 45 Cal.3d 1348, 1360. (See also *Kaplan v. State Bar*, *supra*, 52 Cal.3d at p. 1072.)

We consider as persuasive authority the conviction-based case of *In re Distefano*, *supra*, 13 Cal.3d 476, which involved a tax offense resulting in disbarment. Attorney Distefano filed thirteen false income tax returns over a two-year period, claiming refunds totaling over $16,000. Attorney Distefano claimed he was lured into the plan to defraud the United States by a close friend, who exercised substantial influence over him, much like respondent's cousin. Also, similar to the instant matter, the illegal plan in *Distefano* contemplated using the names of living persons (one of whom was a client) without their knowledge or consent and the forgery of their signatures on tax returns. Pursuant to a plea bargain, Distefano was found guilty of three counts of violating title 18 United States Code section 287, resulting in five years' probation. Like respondent, Distefano had no prior record of discipline and practiced for only four years before he began committing the acts of misconduct. His last act of misconduct occurred three years prior to the Supreme Court order of disbarment, whereas respondent committed his last act of the check-writing conspiracy nine years ago. However, both respondent's and attorney Distefano's interim suspensions had been imposed for relatively short periods at the time of their disciplinary hearings. Six character witnesses testified on behalf of Distefano as to his honesty and his competence in the practice of law, including his brother, two attorneys who were colleagues and had the opportunity to observe Distefano in the practice of law (including an attorney at his former law firm), and his commanding officer in the Army Reserves. In addition, a favorable probation report and a letter from his psychiatrist stating Distefano had indicated repentance were admitted into evidence.

The Supreme Court was not persuaded that the evidence in mitigation was sufficient, given that "the misconduct was of an aggravated nature involving successive deliberate fraudulent acts, including forgery, extending over a substantial [two-year] period . . . ." *In re Distefano*, *supra*, 13 Cal.3d at p. 481. And perhaps most relevant to the instant matter was the Supreme Court's expressed unwillingness to accept the level of discipline imposed in the case of *In re Hallinan* (1957) 48 Cal.2d 52, a case relied upon by respondent and the hearing judge in this matter. In rejecting the *Hallinan* recommendation of suspension, the Court noted that Distefano's tax fraud scheme involved the use of the names of thirteen living individuals without their knowledge or consent, which "could well have subjected innocent third parties to investigation by the Internal Revenue Service . . . ." (*Id.* at pp. 481-482.) We share the same concern for the hundreds of clients of respondent, who without their knowledge or consent, had checks made out to them and "negotiated" on their behalf. On this basis, we find *Hallinan* is distinguishable.

We also find the decision of *In re Basinger, supra,* 45 Cal.3d 1348, to be instructive. *Basinger* is a conviction referral case, although it does not involve a tax offense. Instead, Basinger pled guilty to one count of grand theft in connection with the conversion of over $260,000 over a period of time from both his client trust account and the operating accounts of his law partners. The attorney stipulated to his culpability and presented substantial evidence in mitigation, including his voluntary treatment by a psychiatrist, his successful completion of probation, his unblemished record prior to the crime, and testimony about his good character and remorse by several friends, attorneys, former clients and one superior court judge, as well as his treating psychiatrist who said the attorney was suffering from situational stress and that his

misconduct was unlikely to recur. (*Id.* at pp. 1354-1355.) The hearing referee found that the case involved " 'one of the most severe and clear cut breaches of professional responsibility that ha[d] been encountered,' " but he also found the evidence in mitigation to be compelling enough that the attorney deserved a second chance. (*Id.* at p. 1356.) The review department declined to adopt the recommendation of a five-year suspension and, instead, recommended disbarment.

The attorney sought review by the Supreme Court of the disbarment recommendation. The Court acknowledged that "the record contains much evidence attesting to petitioner's past effectiveness as an attorney, the psychological roots of his misconduct, low probability of the misconduct recurring, and his rehabilitation. In addition, we are cognizant of the absence of prior misconduct." (*In re Basinger*, *supra*, 45 Cal.3d at p. 1363.) Nevertheless, the Court stated that it "must still consider the enormity of the crime and its effect on the integrity, high professional standards, and public confidence in the legal profession.[citations.]" (*Id.* at p. 1360.) In so finding, the Court focused on many factors similar to those in the instant case, including the fact that Basinger worked with an accomplice (his office manager), he engaged in an ongoing operation of diverting trust and partnership funds to his own use, signatures were forged on checks by his office manager, he breached basic fiduciary obligations to his clients (and his partners) and "[a]n unusually large amount of money was involved." (*Ibid.*) Furthermore, the Court noted that one could "infer from the evidence that the scheme would have continued indefinitely since it only ceased when [the law partner] discovered petitioner's defalcations." (*Ibid.*) The Supreme Court adopted the review department's recommendation of disbarment, concluding that the more appropriate forum to hear the evidence of the attorney's rehabilitation would be in a proceeding for reinstatement. (*In re* Basinger, *supra*, 45 Cal.3d at p. 1362.)

We also look to *In the Matter of Rech*, *supra*, 3 Cal. State Bar Ct. Rptr. 310, which is a conviction referral case for violation of 18 United State Code section 371. In the Rech case we recommended, and the Supreme Court ordered, disbarment. (*Id.* at p. 317.) The hearing judge in the instant matter distinguished *Rech*, finding the mitigating factors were not as compelling, while respondent asserts that the misconduct in the instant matter is far less serious than that of Attorney Rech. However, we find *Rech* to be apt. Rech's conviction was the result of a four-year conspiracy, which involved disguising his client's drug proceeds by investing them in two real estate ventures. The attorney later became involved in his client's illegal drug business by loaning the client $30,000.

This court found that by participating in the laundering scheme, the attorney committed acts of moral turpitude involving concealment and intentional misrepresentations that could have endangered the lives of his business colleague and his family. (*In the Matter of Rech*, *supra*, 3 Cal State Bar Ct. Rptr. at p. 315.) Like Rech, respondent was found to have engaged in multiple acts of misconduct involving moral turpitude. (*Ibid.*) We are unable to discern if respondent's misdeeds are worse than those of Rech. However, we find the similarity in the mitigating circumstances to be instructive as to our determination of the appropriate discipline in this matter. Both Rech and respondent were found to have demonstrated candor and cooperation with the State Bar. (*Ibid.*) Both also presented favorable character testimony. (*Ibid.*) Both expressed remorse (although neither did so promptly). (*Id.* at p. 316, fn.4.) Also, like respondent, Rech had no prior record of discipline. (Rech was given some additional mitigation for the eight years of unblemished practice prior to his misconduct, which, as we discussed, *ante*, we do not consider in mitigation in the instant case due to respondent's brief three-year career

before he engaged in illegal conduct.) (*Ibid.*) Rech and respondent each presented psychological evidence, which was found to corroborate other favorable character testimony showing his remorse. (*Ibid.*) Although this court viewed the mitigation evidence in *Rech* to be "substantial," we determined, in accordance with standard 3.2, "it [is] not compelling [enough] in light of his extremely serious misconduct over a several-year period." (*Id.* at p. 317.)

Finally, the case of *In re Schwartz*, *supra*, 31 Cal.3d 395, which is another conviction referral matter, involved a complex fraud scheme, albeit, one based on mail fraud under title 18 United States Code section 1342, rather than tax fraud. The circumstances surrounding the crime consisted of a fraudulent enterprise to obtain merchandise by creation of false credit information, fictitious entities and a fictitious drivers license, as well as forgery of a fictitious name to open a bank account. The criminal acts began only two years after Attorney Schwartz was admitted to practice and resulted in four years' probation imposed by the superior court. Similar mitigation evidence was presented in the hearing department by the attorney in *Schwartz* as was offered by respondent in the instant matter, including the absence of a prior record of discipline, cooperation with the prosecuting authorities, and other post-conviction behavior that demonstrated remorse and rehabilitation. (*Id*. at pp. 400- 401.) At the time the Supreme Court ordered his disbarment, Schwartz had been on interim suspension for three years. The Court acknowledged "that petitioner regrets his past criminal conduct and the consequences thereof [and the Court had no] reason to dispute the character testimony to that effect." (*Id.* at p. 401.) But in ordering disbarment, the Court did not agree that evidence of remorse was sufficient to establish rehabilitation. " 'In our view, a truer indication of rehabilitation will be presented if petitioner can demonstrate by his sustained conduct over an extended period of time that he is once again

fit to practice law . . . . Petitioner will have an additional opportunity hereafter to demonstrate his fitness in reinstatement proceedings before [the State Bar].' [Citation.]" (*Ibid.*)

In light of the extremely serious nature of respondent's actions over an extended period of years, we recommend disbarment, rather than suspension, as the most appropriate enforcement response to ensure the protection of the public, the courts and the profession. While we commend respondent for the rehabilitation he has shown to date, we do not believe there has been sufficient passage of time to give us the assurance needed that he is once again fit to practice law. (See *In the Matter of Rech, supra*, 3 Cal. State Bar Ct. Rptr. at pp. 316-317.) Even though his last act of the conspiracy occurred in 1993, at all times since then respondent has been either under investigation or under supervision. Furthermore, we are troubled that his misconduct occurred within three or four years after he began practicing law, and his decision to continue his misconduct for six years was primarily motivated by a desire to enhance his standard of living. Equally troubling is respondent's decision to offer only limited cooperation to the government for three and one-half years after the commencement of the investigation by the IRS, albeit with the misguided advice of his tax counsel. We simply are unpersuaded by the record before us that his misconduct would have ceased in the absence of governmental intervention and supervision. Our recommendation of disbarment also is based on respondent's disregard, on virtually hundreds of occasions, of the trust his clients placed in him, with the resulting adverse impact on the integrity of the legal profession, as well as public confidence in the profession. (*In re Basinger*, *supra*, 45 Cal.3d 1348, 1360.)

III. Recommendation

Respondent best captured the issue presented by this appeal when he testified that "the amounts and the crime and the situations done were terrible . . . [but] I think everybody deserves a second chance in life." We agree, but leave his second chance to another time and place than that here urged by respondent. Accordingly, we recommend that evidence of respondent's rehabilitation and fitness to practice law should be presented at a reinstatement proceeding following disbarment. (*In re Schwartz*, *supra*, 31 Cal.3d at p. 401.) This court has drawn a distinction between the showing of rehabilitation required for an attorney seeking reinstatement and that necessary to satisfy the more modest standard 1.4(c)(ii) proceedings. (*In the Matter of Terrones* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 289, 298.) We believe the stronger showing of rehabilitation required in a reinstatement proceeding is necessary here in light of the length and severity of respondent's misconduct and its direct relationship to the practice of law.

Respondent may seek reinstatement five years from the initial date of his suspension. (Rule 662(b).) At that time respondent will have completed his federal sentence of five years' probation, and a thorough re-appraisal, investigation and review of respondent's fitness to practice law can be made. In this manner, the public can be assured, to the greatest extent possible, of respondent's rehabilitation.

Accordingly, we recommend that respondent be disbarred and his name stricken from the roll of attorneys.

We further recommend that respondent be ordered to comply with the provisions of California Rules of Court, rule 955 and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court's

order in this matter. We further recommend that the State Bar be awarded costs in accordance with Business and Professions Code section 6086.10 and that such costs be payable in accordance with Business and Professions Code section 6140.7.

EPSTEIN, J.

We concur:

STOVITZ, P. J.

WATAI, J.

Case No. 99-C-11604

In the Matter of Mitchell H. Kreitenberg

Hearing Judge

Robert M. Talcott

Counsel for the Parties

For the State Bar of California:	Donald R. Steedman Office of the Chief Trial Counsel The State Bar of California 180 Howard Street San Francisco, CA 94105-1639
For Respondent:	Arthur Lewis Margolis Margolis & Margolis LLP 2000 Riverside Drive Los Angeles, CA 90039-3758